No. 73-873

APR 2 19
MICHAEL RODAK, JR

# In the Supreme Court of the United States

OCTOBER TERM, 1973

JACK HALPERIN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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After a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of receiving and concealing money stolen from a national bank, in violation of 18 U.S.C. 2113(c). He was fined $5,000 and sentenced to five years' imprisonment.[1] The court of appeals affirmed *per curiam*, without hearing oral argument (Pet. App. A).

Petitioner urges that the admission into evidence of a conversation between himself and a government witness, which was taped after his indictment, violated the rule enunciated in *Massiah* v. *United States*, 377 U.S. 201. The witness, who had originally denied any knowledge of petitioner's activities (Tr. 373-374, 396-397), had not testified at the first two trials. After the second trial, she gave a full statement inculpating petitioner to an

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[1]Petitioner had been tried twice before on the same charge. The first trial resulted in a conviction which was reversed on appeal, *United States* v. *Halperin*, 441 F.2d 612 (C.A. 5). The second trial resulted in a hung jury.

FBI agent.[2] A few days after giving her statement, she called the agent and told him that she had been advised by her brother that petitioner wanted her to call him, that she had talked to petitioner, and that she was concerned for her safety (Tr. 18-19, 26-27, 377-378). The agent neither encouraged nor discouraged her from calling petitioner again (Tr. 19-20). He attached a recording device to her telephone, but left it to her to decide whether she would activate it (Tr. 20). The witness had three subsequent conversations with petitioner[3] and gave tapes of all three to the prosecutor. During the conversations, petitioner alluded to the witness' earlier experiences, including a beating and the cutting of the brake hose of her car, which, he reminded her, she ceased having when she agreed not to testify for the government. He implied that she should continue with that course (Tr. 594-595). During trial, the witness testified to the beating and the tampering with her car, threats made to keep her quiet (Tr. 371-373), as well as to her telephone conversations with petitioner (Tr. 378-379). Petitioner was cross-examined about the telephone conversations, and segments of the recordings were played when he disputed what was said (Tr. 580-596, 608-611).

The court of appeals properly affirmed petitioner's conviction. This case is fundamentally different from *Massiah*, in which this Court held that the Sixth Amendment prohibited the use against the accused at trial of "evidence of his own incriminating words, which federal

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[2]She testified in the instant trial and explained that her original false disavowal of knowledge had been motivated by fear (Tr. 409).

[3]It is not clear from the record whether petitioner or the witness initiated the calls.

agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." *Massiah, supra,* 377 U.S. at 206. In this case, law enforcement officers did not elicit the testimony, either directly or through an intermediary (as in *United States* v. *Brown,* 466 F.2d 493, 494-495 (C.A. 10), relied upon by petitioner (Pet. 7)). There is nothing in the record to suggest that petitioner was induced or encouraged to threaten this witness. Rather, the record makes clear that conversations between the witness and petitioner were not instigated by the police and, although the means for recording them were provided, the decision to use the device was that of the witness, who acted out of her own desire to protect herself from petitioner, and the decision to threaten her was that of petitioner, who acted out of a desire to prevent her testimony. In short, this case involved no "indirect and surreptitious interrogation" of the kind condemned in *Massiah, supra,* 377 U.S. at 206.[4]

Moreover, petitioner's remarks to the witness in this case, unlike those in *Massiah,* were not directly incriminatory of the offense with which he was charged; instead, they were relevant in disclosing a consciousness of guilt. Finally, the petitioner's threats to the witness

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[4]Both *McLeod* v. *Ohio,* 381 U.S. 356 and *United States ex rel. O'Connor* v. *New Jersey,* 405 F.2d 632 (C.A. 3), relied upon by petitioner, involved interrogations by the police. In *Beatty* v. *United States,* 389 U.S. 45, on which petitioner also relies, the informant whose conversation with defendant was overheard was, as in *Massiah,* acting under the direction of a government agent. See *Beatty* v. *United States,* 377 F.2d 181, 184, 188-191 (C.A. 5).

constituted an independent criminal offense (obstruction of justice), the commission of which could not properly be ignored.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

APRIL 1974.